UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

TONI F. NATALIE, Debtor. — Case No.: 99-16195, Chapter 7

KRISTIN KEEFFE, Plaintiff,

-against- — Adversary Pro. No.: 04-90007

TONI F. NATALIE, Defendant.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matter before the court is the motion of Toni F. Natalie ("Debtor") for summary judgment under Fed. R. Civ. P. 56, as made applicable to this proceeding by Fed. R. Bankr. P. 7056, regarding the adversary complaint filed by Kristin Keefe ("Plaintiff") seeking revocation of the Debtor's discharge pursuant to 11 U.S.C. § 727(d)(1) and (d)(2).[1] [2]

[1] All further section references correspond to Title 11 of the United States Code (the "Bankruptcy Code").

JURISDICTION

The court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), (b)(2)(A), (b)(2)(J), and 1334.

FACTS

1) The Debtor filed her Chapter 7 petition on October 27, 1999.

2) The Debtor previously prevailed in an adversary proceeding seeking the denial of her discharge brought by Keith Raniere in which the Plaintiff was a witness ("Raniere Proceeding").

3) The Debtor's discharge was issued on or about January 7, 2003.

4) On or about January 7, 2004, the Plaintiff filed a Complaint seeking to revoke the Debtor's discharge.

5) On or about May 5, 2004, the Plaintiff filed an Amended Complaint asserting three causes of action predicated on 11 U.S.C. § 727(d)(1) and (d)(2).

6) On or about July 8, 2004, the Debtor filed her answer denying the main thrust of the Amended Complaint and asserting three affirmative defenses: estoppel, laches, and waiver.

ARGUMENTS

The Plaintiff states that the Debtor's false or misleading testimony regarding certain corporate entities, "Blue Crystal, LLC" ("BC"), "Hi-Step Enterprises, Inc." ("HSE"), "Deforte

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[2] 11 U.S.C. § 727 is entitled "Discharge" and subsection (d) states in relevant part:
On request of the trustee, a creditor, or the United States Trustee, and after notice and a hearing, the court shall revoke a discharge granted . . . if

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee . . . .

Enterprises, Inc." ("Deforte"), and the sale of assets of HSE, including the name "Mr. Shoes Pizza" ("Shoes"), allowed the Debtor to fraudulently obtain her discharge and that the Plaintiff did not know of the fraud until after the discharge was issued. The Plaintiff further states that the Debtor's false or misleading testimony was motivated by the Debtor's desire to maintain her ownership interests in the corporations, including the proceeds and profits, to the detriment of her creditors and the bankruptcy estate. Additionally, the Plaintiff argues that the Debtor failed to deliver or surrender certain property to the Trustee.

After answering, the Debtor moved for summary judgment asserting, *inter alia,* that:

1) The Plaintiff lacked standing to commence the adversary proceeding;

2) The Plaintiff was aware or should have been aware of any issues regarding HSE and the Shoes name due to her involvement in the Raniere Proceeding; and

3) The Debtor did not have any ownership interest in Deforte as per the affidavits of David Deforte and Michael Rudin, an attorney who formerly represented the Debtor.

The Debtor identifies several facts that support her summary judgment motion, including: that the Plaintiff attended the § 341 meeting of creditors in September 1999, and thus she had "nearly forty-nine (49) months from the meeting of creditors to raise and resolve any issue concerning the Debtor and [BC] (a disclosed asset on the bankruptcy petition) prior to the issuance of the Debtor's discharge" (Debtor's Mot. for Summary Judgment in Adversary Proceeding ¶ 24); many of the exhibits attached to the amended complaint and relied upon by the Plaintiff to prove her case were in her possession as early as 2002, approximately one year before discharge (*id.* ¶ 26); she had personal knowledge of any alleged fraud prior to discharge, as evidenced by her plan to testify in the Raniere Proceeding about the identical issues raised here (*id.* ¶ 30); and "the Plaintiff was integrally involved in repeated unsuccessful attempts to object to the Debtor's discharge" (*id.* ¶ 32),

so she cannot now claim lack of knowledge so as to obtain the original relief requested by way of § 727(d).

In opposition to the motion, the Plaintiff alleges that she is a creditor of the Debtor with the requisite standing to bring the current adversary. The Plaintiff further states that even though the Debtor's petition disclosed her interest in BC, her subsequent misrepresentations, in effect, rendered the initial disclosure a nullity. It is the Plaintiff's position that if the court were to allow the discharge to remain intact, it would thereby be rewarding deceitfulness.

As regards her allegation concerning the Debtor's ownership interest in Deforte, the Plaintiff states that in September 2000, the Debtor signed an answer in a state court lawsuit as the President of Deforte. As such, a question of fact exists as to what, if any, ownership interest, the Debtor had at the time of filing.

DISCUSSION

A. STANDING

It is clear that when the totality of the Raniere Proceeding transcript is considered, the Plaintiff has standing to continue this adversary proceeding. She provides specific detail regarding obligations supposedly due her from the Debtor, who has not disputed the allegations. While these declarations may not be the equivalent of a proof of claim, they are sufficient to rebut the Debtor's bare statement that the Plaintiff is not a creditor. Section 101(10) defines "creditor" as an "[e]ntity that has a claim against the debtor that arose . . . before the order of relief concerning the debtor . . . ." Section 101(5) defines "claim" as a "[r]ight to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." At best, the Debtor may dispute the liability of the

alleged indebtedness, but even so, the Plaintiff has standing to prosecute this adversary proceeding.

B. SUMMARY JUDGMENT STANDARD

The standard for summary judgment is well established. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196 (2d Cir. 2004); *In re Bennett Funding Group, Inc.*, 336 F.3d 94 (2d Cir. 2003). "In deciding that summary judgment is appropriate, the Court must determine that there is no genuine issue of material fact, taking the pleadings, depositions, answers to interrogatories and admissions on file, together with any other firsthand information including but not limited to affidavits." *In re Bennett Funding Group, Inc.*, 336 F.3d at 99. Following such a finding, the movant is entitled to summary judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. at 323.

The moving party always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* Once a *prima facie* showing is made that there is no genuine issue of material fact or that there is no evidence to support the non-moving party's case, then the burden shifts to the non-moving party to designate "specific facts showing that there is a genuine issue for trial." *Id*. at 324. Throughout this inquiry, all justifiable inferences are to be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

C. 11 U.S.C. § 727(d)(1)

Revocation of discharge is an extraordinary remedy. *In re Trost*, 164 B.R. 740, 743 (Bankr. W.D.Mich. 1994). The § 727(d) revocation provisions must be "construed liberally in favor of the debtor and strictly against those objecting to discharge." *Id.* (citation omitted); *In re Bowman*, 173 B.R. 922, 924 (B.A.P. 9th Cir. 1994) (citation omitted). Section 727(d)(1) requires that (1) the

debtor obtained a discharge through fraud, and (2) the movant did not know of the fraud predischarge.

If a creditor has knowledge of a possible fraud, the burden is on that party to diligently investigate any possible fraudulent conduct before discharge. If the party decides to wait until after discharge, that party risks dismissal of its § 727(d)(1) action. *In re Bowman*, 172 B.R. at 925 (citation omitted). A party requesting revocation has the burden of proving the lack of knowledge of the fraud before discharge and failure to carry this burden is fatal to the party's case. 6 Collier on Bankruptcy ¶ 727.15(a), at 727-75 (Lawrence P. King, et al, eds., 15th ed. rev. 1999) (citations omitted).

A party is charged with constructive notice of a transaction from the time it is properly recorded. That notice may be sufficient to bar a subsequent request to revoke a discharge. *Id.* In the instant case, the Plaintiff's § 727(d)(1) claim is predicated on fraud involving BC and HSE. As regards BC, the Plaintiff's Amended Complaint and affidavit in opposition to the Debtor's motion are silent as to what fraud, if any, was committed and why it was not discoverable prior to discharge. To the contrary, attached to the Plaintiff's affidavit are numerous New York State tax warrants and one Internal Revenue Service tax lien all concerned with predischarge tax periods to indicate that BC was still operating after the Debtor testified that operation had ceased. The Plaintiff does not address why the tax information utilized was not discoverable years before; the Plaintiff also does not state when she came into possession of these documents. One of the warrants was dated September 2003, but the other documents are dated in 2000 and 2001. The Plaintiff has not convinced the court that any allegations regarding BC were either not discovered or not discoverable prior to discharge. Therefore, the motion of the Debtor to dismiss that portion of the Plaintiff's

second cause of action relating to BC is granted.

As a further basis for revocation, the Plaintiff also asserts that the Debtor gave false testimony regarding HSE and the sale of its assets, including the Shoes name. However, as pointed out in the Debtor's motion, the Plaintiff was on the witness list in the Raniere Proceeding and was expected to testify about the transfer of the Shoes name. By implication, in being cognizant of the Shoes name issue, the Plaintiff cannot now claim to either have been unaware of other HSE issues or that such issues were not discoverable prior to discharge. In her affidavit, the Plaintiff disagrees with the assertion that she was the star witness in the Raniere Proceeding, but does not refute that she knew of the Shoes issue well before the discharge. Once again, the Plaintiff has failed to convince the court that any allegations regarding HSE or the Shoes name were either not discovered or not discoverable prior to discharge. As such, the Debtor's motion to dismiss that portion of the Plaintiff's second cause of action relating to HSE or the Shoes name is granted.

D. 11 U.S.C. § 727(D)(2)

Section 727(d)(2) requires a debtor to report any acquisition of estate property or an interest in estate property. There is also a requirement to deliver the property to the Trustee.[3] The Plaintiff's first and third causes of action allege violations of § 727(d)(2) regarding two corporate entities: BC and DeForte.

1) BC

The Plaintiff admits that the Debtor's petition disclosed her interest in BC. The Plaintiff

[3] Although not specifically enumerated by the statute, the duty to deliver property to the trustee would only be triggered by an affirmative request of the trustee. To hold otherwise would mean that every debtor would have to tender every item of estate property to a trustee that may not want it or have a place to store it. Disclosure is the key followed by delivery of those items the trustee will administer.

argues, however, similar to her § 727(d)(1) argument, that the disclosure was so tainted as to render the disclosure a nullity. The Plaintiff offers no case law to support this proposition. BC is a disclosed, prepetition asset that was or could have the subject of whatever reasonable scrutiny any party in interest wished to engage in. There was no failure to report and no allegation that the Trustee ever made any demand to surrender BC assets. Therefore, the motion of the Debtor to dismiss the first cause of action is granted.

2) DeFORTE

The Plaintiff alleges that the Debtor did not report her alleged ownership in DeForte. In her affidavit in opposition to the instant motion, the Plaintiff bases much of her argument on the Debtor's position as President of DeForte in September 2000. Nowhere in her Amended Complaint or affidavit in opposition does she assert that the Debtor actually had, at the time of filing or now, an equity interest in DeForte; rather, the Plaintiff avers that the Debtor's position as President "raises at least a question of fact as to the nature of the Defendant's interest in DeForte Enterprises, Inc." (Aff. of Kristin Keeffe in Opp'n to Mot. for Summary Judgment in Adversary Proceeding ¶ 11). "President" is defined as "[t]he chief executive officer of a corporation or other organization." BLACK'S LAW DICTIONARY 1222 (8th ed. 2004). "Officer" is defined as "[a] person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary or treasurer." *Id*. at 1117. The term "president" thus refers to an employee of the corporation. It does not confer an automatic ownership interest in and of itself. Not only is the term "president" not automatically indicative of an ownership interest, but the Plaintiff does not hint or allege that the Debtor's employee status as President even continued until the date of filing. There is simply no basis in law to automatically bootstrap an employee's status to one of ownership

interest. As such, the Debtor's motion to dismiss the Plaintiff's third cause of action is granted.

CONCLUSION

In sum, the court grants the Debtor's motion for summary judgment in its entirety and the Amended Complaint is hereby dismissed.

It is so ORDERED.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge